Filed 12/19/08 E.O.C. Ord, Inc. v. Makoff CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

E.O.C. ORD, INC., et al., Plaintiffs and Appellants, v. JOHN MAKOFF et al., Defendants and Appellants.	B200964 (Los Angeles County Super. Ct. No. BC363184)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Reversed in part, affirmed in part and remanded with directions.

Rankin, Sproat, Mires, Beaty & Reynolds, Geoffrey A. Beaty, Kevin R. Mintz and Bryce Gray, for Plaintiffs and Appellants.

David M. Bass & Associates, David M. Bass, Peter M. Cho, Janine F. Cohen, and Michael O. Murphy, for Defendants and Appellants.

In the underlying action, E.O.C. Ord, Inc. (Ord), and the Law Offices of David McNeil Morse (Morse) asserted that John Makoff and Joel McIntyre fraudulently induced them to enter into contracts for legal services with the Unique Investment Corporation (Unique). Makoff and McIntyre demurred to the complaint, and filed a motion under Code of Civil Procedure section 425.16, the law designed to curtail the filing of strategic lawsuits against public participation, often called the "anti-SLAPP law."[1] The trial court sustained Makoff and McIntyre's demurrer to the complaint without leave to amend and denied the anti-SLAPP motion. Ord and Morse have appealed from the ruling on the demurrer, and Makoff and McIntyre have cross-appealed from the denial of the anti-SLAPP motion. We reverse the ruling on the demurrer, and affirm the denial of the anti-SLAPP motion.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

During the pertinent period, Makoff was the managing director of Unique, and McIntyre was Unique's outside corporate counsel. Until 1999, Unique controlled a mail sorting company that employed Jayprakash and Leela Dhanak. In late 2001, after the Dhanaks and the mail sorting company were charged with mail fraud and related crimes in federal district court, Unique retained Ord and Morse to represent the Dhanaks. In September 2002, Ord and Morse initiated an action against Unique, alleging that Unique had failed to pay the fees required under the retainer agreements. Their complaint asserted claims for breach of contract, common count, account stated, quantum meruit and declaratory relief. On May 7, 2004, following a bench trial, a judgment was entered in Ord's and

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[1] All further statutory citations are to the Code of Civil Procedure, unless otherwise indicated.

Morse's favor for $683,731.16, plus interest, costs, and an award of attorney fees. When Ord and Morse tried to enforce the judgment, Unique asserted that it owed $30 million to a secured creditor, Melanie Bastian, and had assets valued at only $14 million.

On June 15, 2006, Ord and Morse filed their complaint in the underlying action, which contains a single claim for promissory fraud against Makoff and McIntyre. The complaint alleged the following facts: In late 2001, Makoff and McIntyre, acting on Unique's behalf, negotiated the retainer agreements with Ord and Morse. Under the agreements, Unique was obliged to compensate Ord and Morse at fixed hourly rates, and pay each an initial retainer fee of $200,000. Shortly after the agreements were signed in November 2001, McIntyre told Ord and Morse that Melanie Bastian, one of Unique's shareholders or partners, was worth $900 million, and would provide funds when needed. In January 2002, when Unique did not provide the retainer fees as scheduled, Makoff and McIntyre reassured Ord and Morse that they would be paid for their services. Thereafter, McIntyre repeatedly assured Ord and Morse that they would be paid.

The complaint further alleged that when Unique did not pay as promised, Ord and Morse initiated their 2002 breach of contract action against Unique. On June 17, 2003, while conducting discovery in the action, Ord and Morse learned for the first time that Makoff and McIntyre had engaged in promissory fraud when McIntyre admitted in a deposition that "there had never been any intent" Unique would comply with the agreements. McIntyre "testified that Unique's secret intention had been to pay [Ord and Morse] only a flat fee of $200,000 for all the work done by [them] on the case, for both Dhanaks, and nothing more." Makoff testified similarly during his deposition in September 2003, and Makoff and McIntyre reaffirmed their fraud at the trial in the breach of contract action.

Makoff and McIntyre demurred to the complaint in the underlying action on the grounds that it was barred by the doctrine of res judicata, and was untimely under the applicable three-year statute of limitations (§ 338, subd. (d)). In addition, they filed an anti-SLAPP motion, contending that the claim for promissory fraud arose from protected activity, namely, the negotiation of agreements for legal representation in the criminal action against the Dhanaks. The trial court sustained the demurrer without leave to amend solely on the basis of res judicata, and denied the anti-SLAPP motion. Ord and Morse noticed an appeal from the ruling on the demurrer, and Makoff and McIntyre noticed a cross-appeal from the denial of the anti-SLAPP motion.[2]

DISCUSSION

A. *Appeal*

Ord and Morse contend that the trial court improperly sustained the demurrer to their complaint without leave to amend. We agree.

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[2] Ord and Morse have filed a premature notice of appeal, as the order on the demurrer is not appealable and the record otherwise lacks a judgment. (*Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 2, fn. 1.) In the interest of judicial economy, we deem the order to incorporate a judgment of dismissal. (*Ibid*.)

We also note that Makoff and McIntyre's notice of cross-appeal challenges the trial court's failure to rule on their alternative ground for the demurrer, namely, that the claim for promissory fraud is untimely under the applicable statute of limitations. Because we will affirm the ruling on the demurrer on any ground supported by the record (see pt. A.1., *post*), our review of Ord's and Morse's appeal encompasses the alternative ground for the demurrer.

1. *Standard of Review*

"Because a demurrer both tests the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review on appeal. [Citation.] . . . Appellate courts first review the complaint de novo to determine whether or not the . . . complaint alleges facts sufficient to state a cause of action under any legal theory, [citation], or in other words, to determine whether or not the trial court erroneously sustained the demurrer as a matter of law. [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879, fn. omitted.) Moreover, "[i]f another proper ground for sustaining the demurrer exists, this court will still affirm the demurrer[] even if the trial court relied on an improper ground . . . ." (*Id.* at p. 880, fn. 10.)

"When [so] reviewing a demurrer on appeal, appellate courts generally assume that all facts pleaded in the complaint are true. [Citation.]" (*Cantu v. Resolution Trust Corp., supra*, 4 Cal.App.4th at p. 877, fn. omitted.) However, "[t]he complaint should be read as containing the judicially noticeable facts, 'even when the pleading contains an express allegation to the contrary[]'" (*id.* at p. 877, quoting *Chavez v. Times-Mirror Co.* (1921) 185 Cal. 20, 23), and an appellate court may take judicial notice of facts not subject to judicial notice by the trial court (*Taliaferro v. County of Contra Costa* (1960) 182 Cal.App.2d 587, 592).

"Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend the complaint to state a cause of action. [Citation.]" (*Cantu v. Resolution Trust Corp., supra*, 4 Cal.App.4th at p. 879, fn. 9.)

2. *Res Judicata*

In sustaining the demurrer, the trial court concluded that Ord and Morse's complaint failed under the doctrine of res judicata, reasoning that they had

improperly "split" their cause of action by failing to assert promissory fraud against Makoff and McIntyre in their breach of contract action against Unique.

Generally, "'[r]es judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.' [Citation.] Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896, quoting *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn. omitted.)

The focus of our inquiry is on the merger rule of claim preclusion. Under this rule, "all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date"; the rule thus prevents "'"piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief."' [Citation.]" (*Mycogen Corp. v. Monsanto Co.*, *supra*, 28 Cal.4th at p. 897, quoting *Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245.)

For purposes of the merger rule, California law identifies a single cause of action as "the violation of a single primary right," which, in turn, is "the plaintiff's right to be free from the particular injury suffered." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.) So understood, the violation of a primary right may support multiple theories of recovery for the pertinent injury while establishing only a single cause of action. (*Ibid*.) "Thus, a single cause of action is based on the harm suffered, rather than on the particular legal theory asserted or relief sought by the

plaintiff. [Citations.]" (*Balasubramanian v. San Diego Community College Dist.* (2000) 80 Cal.App.4th 977, 991.)

An exception to the merger rule obtains when a plaintiff brings successive actions against separate tortfeasors. California courts have long held that a judgment against a tortfeasor, by itself, "does not preclude pursuit of joint or concurrent tortfeasors." (*Milicevich v. Sacramento Medical Center* (1984) 155 Cal.App.3d 997, 1002; see *Williams v. Reed* (1952) 113 Cal.App.2d 195, 204; *Cole v. Roebling Construction Co.* (1909) 156 Cal. 443, 447-448.)

In applying this exception to the merger rule, California follows section 49 of the Restatement Second of Judgments (*Milicevich v. Sacramento Medical Center*, *supra*, 155 Cal.App.3d at p. 1002), which states: "A judgment against one person liable for the loss does not terminate a claim that the injured party may have against another person who may be liable therefor[e]." Comment a to this section elaborates: "When a person suffers injury as the result of the concurrent or consecutive acts of two or more persons, he has a claim against each of them. If he brings an action against one of them, he is required to present all the evidence and theories of recovery that might be advanced in support of the claim against that obligor . . . . If he recovers judgment, his claim is 'merged' into the judgment so that he may not bring another action on the claim against the obligor whom he has sued. . . . But the claim against others who are liable for the same harm is regarded as separate. Accordingly, a judgment for or against one obligor does not result in merger . . . of the claim that the injured party may have against another obligor." (Rest.2d Judgments, § 49, com. a, p. 34.)

Here, Ord and Morse's claim for promissory fraud against Makoff and McIntyre falls within this exception to the merger rule.[3] Even if a claim for promissory fraud by Ord and Morse against Unique would have implicated the same primary right as their claim for breach of contract against Unique -- a matter we do not address -- Makoff and McIntyre are independently liable for the fraud. In *Croeni v. Goldstein* (1994) 21 Cal.App.4th 754, 756, an officer of a corporation negotiated the corporation's purchase of a printing business. The owners of the printing business sued the corporation and the officer for promissory fraud, alleging that they never intended to honor the sales contract. (*Id*. at p. 757.) After the officer obtained judgment on the pleadings on the fraud claim, the appellate court reversed, reasoning that the officer, in making fraudulent misrepresentations on behalf of the corporation, had rendered himself individually liable for fraud, even though he was not a party to the sales contract. (*Id.* at p. 758; see also Rest.2d Torts, § 530, subds. (1), com. c; (2), com. e [an intentional misrepresentation regarding a third party's intent to honor a contract may constitute actionable fraud].) In view of *Croeni*, Makoff's and McIntyre's liability for promissory fraud is independent of Unique's liability (if any) for this tort.

Makoff and McIntyre contend that the merger rule precludes the claim of promissory fraud against them because they were in privity with Unique. Generally, "[t]he loose term 'privity' refers to some relationship or connection

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3 Makoff and McIntyre do not contend that Ord and Morse's complaint, viewed in isolation, inadequately alleges the elements of a claim for promissory fraud, that is, misrepresentation involving a contract in which "the promisor knows what he or she is signing but consent is induced by fraud." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 297, p. 324, italics omitted.) Generally, "'"[t]he elements of fraud, which give[] rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage."' [Citation.]" (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.)

with the party that makes it proper to hold 'privies' bound with the actual parties. 'Who are privies requires careful examination into the circumstances of each case as it arises. In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right.' [Citations.]" (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 456, p. 1113, quoting *Zaragosa v. Craven* (1949) 33 Cal.2d 315, 1113.)

Here, Makoff and McIntyre point to Code of Civil Procedure section 1908, subdivision (b), which states: "A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound." They argue that they were, respectively, a "managing shareholder" and outside counsel for Unique; that they controlled and participated in the breach of contract action; that they had a financial interest in its outcome; and that the factual determinations in it may have a "collateral estoppel" effect in the underlying action.

Makoff and McIntyre's contention fails for two reasons. First, subdivision (b) of section 1908 of the Code of Civil Procedure codifies section 84 of the Restatement of Judgments (section 84), which is identical in language. As the court explained in *Vanguard Recording Society, Inc. v. Fantasy Records, Inc.* (1972) 24 Cal.App.3d 410, 416-417, section 84 is applicable only to issue preclusion (that is, collateral estoppel), and "has nothing to do with merger or bar." As comment b to section 84 states: "[S]ince the one in control is not a party to the action, the cause of action upon which the judgment is based is necessarily a different cause of action from that which is the basis for a subsequent action between him and a party to the action." (Rest., Judgments, § 84, com. b, p. 392.)

Section 84 thus operates solely to bind the person in control of an action to the factual determinations *actually* made in the action. (*Ibid*.) Because nothing before us suggests that the factual issues central to promissory fraud -- namely, whether Makoff , McIntyre, or Unique intended not to honor the agreements before their execution -- were actually decided in the breach of contract action, section 84 does not preclude Ord and Morse's claim for promissory fraud.

Second, Makoff's and McIntyre's relationship with Unique do not, by themselves, place them in privity with Unique for purposes of the merger rule. Regarding this issue, at least one California court has applied section 59 of the Restatement Second of Judgments, which provides that absent special circumstances, "a judgment in an action to which a corporation is a party has no preclusive effects on a person who is an officer, director, stockholder, or member of a non-stock corporation."[4] (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 150-151.) The only exceptions to this principle potentially applicable here are for closely held corporations, and for cases in which the officer, director, stockholder, or member has acted as the corporation's agent. (Rest.2d Judgments, § 59, subds. (1), (3).) Nothing before us establishes that Unique is closely held; moreover, assuming arguendo that Makoff and McIntyre acted as Unique's agents in negotiating the contracts with Ord and Morse, their status as agents would not implicate the merger rule, although it might effect issue preclusion with respect to

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[4] Comment a to section 59 explains: "A corporation is for most purposes treated as a jural person distinct from its stockholders, members, directors, and officers. . . . A judgment in an action to which a corporation is a party does not in general bind or redound to the benefit of its stockholders, members, or management, except insofar as it affects the corporation itself." (Rest.2d Judgments, § 59, com. a, p. 95.)

the amount of compensatory damages. (Rest.2d Judgments, § 51, subd. (2).)[5] Accordingly, Makoff's and McIntyre's relationship to Unique do not trigger the merger rule.[6] In sum, the demurrer was improperly sustained on the basis of res judicata.

3. *Statute of Limitations*

Makoff and McIntyre contend that the demurrer may be sustained on an alternative basis, namely, that Ord and Morse's claim for promissory fraud is barred under the applicable statute of limitations. We disagree. A demurrer cannot be sustained on this basis "unless the cause of action is necessarily barred by a statute of limitations. [Citations.]" (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 825.) That is not the case here.

Generally, "a statute of limitations does not begin to run until the cause of action accrues." (*Spear v. California State Auto. Assn.* (1992) 2 Cal.4th 1035, 1040.) Claims of promissory fraud are subject to the three-year limitations period found in section 338, subdivision (d). (*Magpali v. Farmers Group, Inc.* (1996) 48

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5 Restatement Second of Judgments section 51, which addresses the "preclusive effects" of the judgment in an action against a principal, states that absent specified exceptions, "[a] judgment [against a principal] in favor of the injured person is conclusive upon him as to the amount of his damages." (Rest. 2d Judgments, § 51, subd. (2).)

6 The case authority upon which Makoff and McIntyre rely for their contention concerning Code of Civil Procedure section 1908, subdivision (b), is inapposite. One of the cases simply addresses issue preclusion (*Stafford v. Russell* (1953) 117 Cal.App.2d 319, 320 [person who controlled corporation's conduct in litigation is bound by the findings in the litigation]); the remaining cases address privity relationships not involving a corporation in the context of issue preclusion (*French v. Rishell* (1953) 40 Cal.2d 477, 481 [pension board, as agent of city, is bound by finding made in prior administrative action to which city was party]; *Zaragosa v. Craven*, *supra*, 33 Cal.2d at pp. 317-319 [wife is in privity to husband for purposes of issue preclusion]; *Servente v. Murray* (1935) 10 Cal.App.2d 355, 361 [findings in action involving city's pension board are binding on city's mayor and other officials].)

Cal.App.4th 471, 480-483.) However, the discovery rule governs the accrual of such claims, that is, they accrue when the plaintiff discovers "the facts constituting the fraud or mistake" (§ 338, subd. (d)). Here, the crux of Ord and Morse's claim of promissory fraud is that during the negotiations regarding the retainer agreements, Makoff and McIntyre induced them to execute the agreements, despite their knowledge that Unique would never honor them. The complaint, which was filed on June 15, 2006, alleges that Ord and Morse first learned about this fact on June 17, 2003, when they took McIntyre's deposition.

Pointing to *Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292 (*Saliter*), Makoff and McIntyre contend that the complaint's allegations are inadequate to trigger the discovery rule. As Witkin explains, a party asserting the discovery rule must plead: "(a) lack of knowledge; (b) lack of means of obtaining knowledge (in the exercise of reasonable diligence the facts could not have been discovered at an earlier date); [and] (c) how and when the plaintiff did actually discover the fraud or mistake. Under this rule, constructive and presumed notice or knowledge are equivalent to knowledge. So, when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation (such as public records or corporation books), the statute commences to run." (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 659, p. 870.)[7] Whether a given set of circumstances would have motivated a reasonable person to make an investigation, and whether such an investigation would have uncovered a specific

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[7] Under Civil Code section 19, "[e]very person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

fact, are generally issues of fact. (*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 440-441.)

In our view, the complaint's allegations support the application of the discovery rule. The complaint alleges that after Ord and Morse executed the retainer agreements, Unique failed to pay as promised, but Makoff and McIntyre repeatedly assured them that they would be paid; that Ord and Morse initiated a breach of contract action against Unique and conducted discovery; and that Makoff and McIntyre admitted for the first time during their depositions in 2003 their specific intent to defraud Ord and Morse. Even if Unique's breach of the agreements, by itself, might have raised suspicions in a reasonable person about Makoff's and McIntyre's intentions during the negotiations regarding the agreements, nothing in the complaint suggests that Ord and Morse could have uncovered their concealed intentions by an investigation prior to the depositions.

Saliter is factually distinguishable. There, the plaintiff asserted a claim against a mortuary for negligence in the handling of his deceased father's body. (*Saliter*, *supra*, 81 Cal.App.3d at pp. 294-295.) To avoid the operation of the applicable statute of limitations, the plaintiff alleged that although he had known about the purported negligence and resulting injury within the statutory period, his chronic depression following his father's death had prevented him "from perceiving the causal link between the two." (*Id*. at p. 297.) The appellate court concluded that these allegations were insufficient to trigger the discovery rule, reasoning that the application of the rule is tied to the standard of a reasonable person. (*Id*. at pp. 297-298.) As we have explained, Ord and Morse's allegations do not establish that a reasonable person would have uncovered the fraud within the statutory period.

Makoff and McIntyre also contend there are judicially noticeable facts conclusively establishing that Ord and Morse had actual or constructive notice of

the promissory fraud prior to June 17, 2003. In connection with their demurrer, they asked the trial court to take judicial notice of excerpts from Ord's and Morse's testimony at the trial in the breach of contract action, which occurred in October 2003. According to the excerpts, Morse testified that he met with Ord, Makoff, and McIntyre in February 2002, shortly after the retainer agreements were executed. Morse stated: "And I remember very distinctly Mr. Makoff started out the meeting saying he didn't believe in paying people in advance for work they hadn't done. Which shocked me because I had a signed agreement from the man saying he was going to advance me $200,000 as an initial retainer." Regarding the same meeting, Ord testified: "Well, to my great surprise, [Makoff] said that he didn't believe in paying retainers. And that he just wanted to pay bills as they came in, which of course was not the agreement that we had."

In our view, these excerpts cannot establish that Ord and Morse had actual or constructive knowledge of their promissory fraud claim in February 2002. Generally, courts addressing demurrers will not take judicial notice of the truth of statements contained in deposition transcripts or declarations included in court records. (*Bach v. McNelis* (1989) 207 Cal.App.3d 852, 864-865; see *Garcia v. Sterling* (1985) 176 Cal.App.3d 17, 21-22 (*Garcia*).) As the court explained in *Garcia,* "[a]lthough the existence of statements contained in a deposition transcript filed as part of the court record can be judicially noticed, their truth is not subject to judicial notice." (*Garcia, supra*, 176 Cal.App.3d at p. 22.) In ruling on a demurrer, a trial court may properly take judicial notice of matters found in deposition transcripts or elsewhere only when "'there is not or cannot be a factual dispute'" about the matters in question. (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375, quoting *Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134.) Under these principles, we will take judicial notice that Ord and Morse testified as disclosed by the excerpts, but *not* that the testimony is

true: the facts to which Ord and Morse testified -- namely, that Makoff made certain statements during the February 2002 meeting -- are not beyond "factual dispute." (*Joslin v. H.A.S. Ins. Brokerage*, *supra*, 184 Cal.App.3d at p. 375.)[8]

Makoff and McIntyre also contend that a declaration by McIntyre filed in the breach of contract action on March 17, 2003, provided Ord and Morse with constructive notice of their fraud claim. Nothing in the declaration supports their contention.

According to McIntyre, when he negotiated with Ord regarding legal representation for the Dhanaks, Ord presented a draft engagement letter that requested a $200,000 refundable retainer fee. McIntyre stated: "That seemed like a fair fee to Unique. The understanding that I had was that the $200,000 payment would carry the case close to, if not through, final disposition. Later [] Morse sent a similar letter . . . . Unique preferred to pay monthly, particularly given the Dhanaks' bad experience with previous counsel, but []Ord said it was important for him and [] Morse to get their money up front so it would not appear to the Court

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8 Nor are the inferences that Makoff and McIntyre ask us draw from the excerpts beyond dispute, even if we were to regard the testimony in the excerpts as true. Generally, constructive knowledge can be established as a matter of law only when the facts unequivocally show that a reasonable person would have acted to uncover the fraud. (*Helfer v. Hubert* (1962) 208 Cal.App.2d 22, 25-26.) In opposition to the demurrer, Ord and Morse submitted other portions of their trial testimony. Ord testified that notwithstanding Makoff's initial remark at the February 2002 meeting, McIntyre "continued to assure [Ord and Morse] . . . that [they] would be paid." Morse testified that his understanding of Makoff's and McIntyre's remarks at the February 2002 meeting was that Unique would pay his bills as submitted, although there was an "open question" about his $200,000 retainer fee. According to Morse, Makoff promised to consult with his partners about the fee, and Morse believed Makoff's representations on this matter. Viewed in context, the excerpts that Makoff and McIntyre submitted do not conclusively establish that in February 2002, Ord and Morse knew, or should have known, that there was no intent to honor the retainer agreements prior to the agreements' execution.

that Unique was influencing the Dhanaks' representation through controlling payment of their counsel." Furthermore, according to McIntyre, after Unique retained Ord and Morse, "[t]heir focus seemed entirely on how they would be paid and not on vindicating the Dhanaks." He stated: "*As a result* of counsel's fixation on fees . . . , Unique decided it would no longer advance moneys to the Dhanaks to fund their defense and advised [Ord and Morse] that while it would consider a reasonable fee arrangement, it would not make the payments demanded . . . totaling $1,300,000. *As a result*, in early 2002, Unique ended its relationship with [Ord and Morse]." (Italics added.) McIntyre thus attributed Unique's failure to compensate Ord and Morse entirely to events following the execution of the retainer agreements. In sum, the demurrer cannot be sustained on the ground that the complaint is untimely under the statute of limitations.

B. *Cross-Appeal*

Makoff and McIntyre contend that the trial court erred in denying their anti-SLAPP motion with respect to Ord and Morse's claim for promissory fraud. We disagree.

1. *Governing Principles*

Under section 425.16, "[w]hen a lawsuit arises out of the exercise of free speech or petition, a defendant may move to strike the complaint. [Citations.] The complaint is subject to dismissal unless the plaintiff establishes 'a probability that [he or she] will prevail on the claim.' [Citations.]" (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 949, quoting § 425.16, subd. (b).) The anti-SLAPP law encompasses claims against a person for acts "'in furtherance of a person's right of petition or free speech.'" (§ 425.16, subd. (e).) These acts include: "(1) any written or oral statement or writing made before a legislative, executive, or

judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

Resolution of an anti-SLAPP motion "requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

"'The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue. [Citation.]' . . . In terms of the so-called threshold issue, the moving defendant's burden is to show the challenged cause of action 'arises' from protected activity. [Citations.] Once it is demonstrated the cause of action *arises* from the exercise of the defendant's free expression or petition rights, then the burden shifts to the plaintiff to show a probability of prevailing in the litigation. . . . [T]he trial court, in making its determination, considers the pleadings and affidavits stating the facts upon which the liability or defense is based. [Citations]." (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 151.) Here, the trial court concluded that Makoff and McIntyre failed to carry their burden regarding the threshold issue, namely, whether the promissory fraud claim arose from protected activity. We review this determination de novo. (*Ibid.*)

As our Supreme Court explained in *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92, in assessing the determination, we must examine the substance of the claims, rather than their form or label: "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability -- and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 92, italics omitted.) Accordingly, "the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity." (*Id*. at p. 89, italics omitted.)

Generally, a plaintiff cannot avoid the application of the anti-SLAPP statute to a claim arising from protected activity merely by denominating it "a 'garden variety' tort claim" or adding allegations regarding nonprotected activity. (*Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 801-802.) "Conversely, a defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant. [Citation.]" (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.) "[I]t is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Martinez v. Metabolife Internat., Inc., supra*, 113 Cal.App.4th at p. 188.)

2. *Showings and Ruling*

Makoff and McIntyre contend that the promissory fraud claim arose out of protected activity within the meaning of section 425.16, subdivision (e)(2), that is,

statements "made in connection with an issue under consideration or review by a . . . judicial body." They argue that the statements allegedly constituting promissory fraud were submitted to the federal district court in the Dhanak criminal action in connection with two issues: (1) whether Ord and Morse should be allowed to substitute in as the Dhanaks' counsel, and (2) whether they should be permitted to withdraw as the Dhanaks' counsel.

To establish that the promissory fraud claim arose from protected activity, Makoff and McIntyre's anti-SLAPP motion relied primarily on the allegations within the complaint. The complaint alleges that Unique initially hired counsel other than Ord and Morse to represent the Dhanaks in the federal criminal action. In October 2001, Unique undertook to find new counsel for the Dhanaks. Makoff and McIntyre negotiated with Ord and Morse, who expressed concerns that if Unique hired them and the federal district court permitted them to substitute in as the Dhanaks' counsel, the court would be unlikely to permit them to withdraw as counsel in the event of a fee dispute. Makoff and McIntyre represented that Unique would pay them in accordance with the retainer agreements.

The complaint further alleges that after the parties executed the agreements in November 2001, the federal district court permitted Ord and Morse to substitute in as the Dhanaks' counsel on December 17, 2001. When Unique failed to pay in accordance with the agreements, Ord and Morse asked for leave to withdraw. The court refused and instead, appointed them as panel counsel. As such, they represented the Dhanaks until the end of the criminal action, and were paid less than they would have received under the agreements. During the trial in Ord and Morse's breach of contract action, Makoff and McIntyre testified that "they had merely entered into the retainer agreements essentially as a ruse, in part to deceive the federal court into permitting [Ord and Morse] to substitute into the case."

Makoff and McIntyre also submitted the reporter's transcript from the hearing in the federal criminal action at which Ord and Morse requested leave to withdraw their representation. The transcript discloses that when Ord and Morse earlier sought permission to substitute in as the Dhanaks' counsel, the court knew that Unique was funding the Dhanaks' defense, and took conflict-of-interest waivers from the Dhanaks.

Ord and Morse opposed the anti-SLAPP motion, arguing that Makoff and McIntyre had submitted no evidence that the federal district court had reviewed and approved the retainer agreements in permitting the substitution of counsel, or that Makoff and McIntyre made any statements to the court in the federal action. In ruling that Makoff and McIntyre had failed to show the promissory fraud claim arose from protected activity, the trial court remarked that the contrary conclusion would subject lawyers to anti-SLAPP motions "every time they filed a lawsuit."

3. *Analysis*

In our view, the trial court did not err. No case has squarely confronted the issue presented here, namely, the scope of protected activity under Section 425.16, subdivision (e)(2), when an attorney seeks compensation for professional services. Nonetheless, we find guidance in *Freeman v. Schack* (2007) 154 Cal.App.4th 719 (*Freeman*), which addresses the scope of such activity when a client asserts claims against an attorney for breach of the duties attached to the attorney-client relationship.

In *Freeman*, David Barry, an attorney representing Arleen Freeman and James Alexander in their action against a corporate defendant for antitrust law violations, decided to conduct the litigation as a class action with Freeman and Alexander as the named class representatives. (*Freeman, supra*, 154 Cal.App.4th at p. 723.) To assist in the action, Barry hired attorney Alexander Schack, a class

action specialist, who undertook attorney-client duties to Freeman and Alexander in his agreement with Barry. (*Id*. at pp. 723-724.) When Schack filed a motion to have Alan Hemphill intervene in the action as the class representative, Barry unsuccessfully sought to disqualify Schack and Hemphill from the action on the basis of Schack's conflict of interest regarding Freeman and Alexander. (*Id*. at pp. 724-725.)

Freeman and Alexander sued Schack for breach of contract and fiduciary duty, alleging that Schack had improperly recruited Hemphill as a competing class representative in their action, and secretly filed and settled a second class action on Hemphill's behalf against the same corporate defendant. (*Freeman*, *supra*, 154 Cal.App.4th at pp. 725, 727-728.) Schack filed an anti-SLAPP motion, asserting that their claims arose from protected activity under subdivision (e)(2) of section 425.16, namely, his statements in the two class actions. (*Freeman*, *supra*, 154 Cal.App.4th at pp. 725-727.) After the trial court granted the motion, the appellate court reversed, reasoning that the principal thrust of Freeman and Alexander's claims -- that is, "the 'activity that g[ave] rise to [Schack's] asserted liability'" -- was "not Schack's filing or settlement of litigation," but rather "his undertaking to represent a party with interests adverse to [Freeman and Alexander], in violation of the duty of loyalty he assertedly owed them in connection with [their class action]." (*Id*. at p. 732, quoting *Navellier*, *supra*, 29 Cal.4th at p. 92.) Because the duty of loyalty is breached "'not when the attorney steps into court to represent the new client, but when he or she abandons the old client,'" Freedman and Alexander's claims did not arise from protected activity, and their allegations regarding Schack's statements in court were "'only incidental to a cause of action based essentially on nonprotected activity.'" (*Freeman*, *supra*, 154 Cal.App.4th at pp. 730-733, quoting *Scott v. Metabolife Internat., Inc* (2004) 115 Cal.App.4th 404, 414.)

On a much simpler set of facts, we reach the same conclusion here. As our Supreme Court has explained: "An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract. [Citations.] In such cases, the plaintiff's claim does not depend upon whether the defendant's promise is ultimately enforceable as a contract." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Under these principles, the breach of the duty underlying promissory fraud ordinarily occurs before or at the time the contract is executed, and is independent of the contractual obligation. (See *Crow v. Kenworthy* (1939) 30 Cal.App.2d 313, 315 [A claim for promissory fraud fails for want of fraudulent misrepresentations "either at the inception of said contract, or prior thereto."].) The principal thrust of Ord and Morse's claim -- the activity that allegedly gives rise to Makoff and McIntyre's liability -- is their misrepresentations to Ord and Morse in the course of negotiating the retainer agreements -- specifically, misrepresentations which were designed to, and did, induce Ord and Morse to sign the agreements. In view of *Freeman*, the fact that the agreements were later disclosed to the federal district court when Ord and Morse substituted in as counsel is "'only incidental'" to the claim for promissory fraud. (*Freeman*, *supra*, 123 Cal.App.4th at p. 732.)

Makoff and McIntyre's reliance on *Navellier* is misplaced, as that case is factually distinguishable. There, the plaintiffs provided management services to an investment fund. (*Navellier*, *supra*, 29 Cal.4th at p. 85.) When the defendant, who acted as the fund's independent trustee, fired the plaintiffs, they sued him and other parties in federal court. (*Id*. at pp. 85-86.) In the course of the litigation, the plaintiffs and defendant negotiated and executed a partial settlement of the plaintiffs' claims under which the defendant agreed to release certain claims. (*Id.* at p. 86.) After the plaintiffs filed an amended complaint, the defendant asserted several counterclaims, which the plaintiffs challenged on the basis of the

release. (*Id*. at p. 86.) The federal district court affirmed the release's validity and dismissed some of the counterclaims. (*Id*. at pp. 86-87.) The federal action was eventually resolved in the defendant's favor. (*Id*. at pp. 86-87.)

The plaintiffs subsequently filed an action in state court, asserting that the defendant had fraudulently misrepresented his intention to be bound by the release during the negotiations of the settlement, and breached the release. (*Navellier*, *supra*, 29 Cal.4th at pp. 86-87.) The defendant filed an anti-SLAPP motion, which the trial court denied. (*Navellier,* at pp. 86-87.) In concluding the denial was improper, our Supreme Court determined that the plaintiffs' claims for promissory fraud and breach of contract arose from protected activity, that is, statements "'in connection with an issue under consideration or review by a . . . judicial body (§ 425.16, subd. (e)(2)).'" (*Navellier,* at p. 90.) As the court explained, the negotiations concerning the release addressed the claims that the defendant could assert in the federal action, and the plaintiffs later relied on the release in seeking the dismissal of his counterclaims in the action. (*Ibid*.)

Here, unlike *Navellier,* Makoff and McIntyre's alleged misrepresentations to Ord and Morse concerned the terms of their compensation, which were collateral to the matters at issue in the federal criminal action. Whereas the defendant's release in *Navellier* was intended to limit -- and did limit -- the claims litigated in the pertinent action, the compensation terms of Ord's and Morse's agreements did not control their conduct of the Dhanaks' defense, and nothing before us establishes that the terms were disclosed to the federal district court, beyond the fact that Unique had agreed to pay Ord and Morse. Moreover, whereas "the [] activity that g[ave] rise to [the defendant's] asserted liability" in *Navellier* (*Navellier*, *supra*, 29 Cal.4th at p. 92, italics omitted) -- namely, his intentional failure not to limit his claims in accordance with the release -- implicated the claims adjudicated in the pertinent action, the corresponding activity alleged

against Makoff and McIntyre -- namely, their misrepresentations regarding the existence of an intent to honor the retainer agreements -- is essentially irrelevant to the issues in the federal action against the Dhanaks. Accordingly, the case before us falls outside the scope of *Navellier*.[9] In sum, the anti-SLAPP motion was properly denied.

DISPOSITION

The order sustaining Makoff and McIntyre's demurrer without leave to amend, as amended herein, is reversed, and the matter is remanded for further proceedings in accordance with this opinion. The order denying Makoff and

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9 The other cases upon which Makoff and McIntyre rely are also factually distinguishable. In *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 231, the court concluded that a derogatory magazine article the defendants had published about the plaintiff constituted protected activity for purposes of an anti-SLAPP motion. No similar sort of public speech is present here.

In *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 779-780, a recording company was obliged to donate a percentage of the royalties from a record to charity, pursuant to an agreement with the owners of the rights to the record. At the request of a rights owner, a lawyer sent a letter to the recording company that warned about an impending complaint, and asked for verification regarding the requisite donation. The appellate court concluded that the letter constituted protected activity because it directly signaled potential litigation. (*Id*. at p. 784.) Here, Makoff and McIntyre's alleged misrepresentations concerned Ord and Morse's compensation, not potential litigation.

In *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1172-1173, the defendant opposed a shelter for battered women that had been the subject of several municipal and administrative hearings. When the defendant requested that the corporation supporting the shelter as a charity withdraw its funding, the shelter sued her for libel and interference with prospective economic advantage. (*Ibid*.) The appellate court concluded that the request constituted protected activity because it concerned a matter under official review. (*Id*. at p. 1175.) As we have explained, the terms of Ord and Morse's compensation were essentially peripheral to the issues under review in the federal criminal action against the Dhanaks.

McIntyre's anti-SLAPP motion is affirmed. Ord and Morse are awarded their costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.